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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN S. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1977. A petition for rehearing was denied on December 22, 1977. The petition for a writ of certiorari was filed on January 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction.

2. Whether the trial court erred by allowing the government on cross-examination to ask a defense witness whether two co-defendants had pleaded guilty to charges in the indictment.

3. Whether the trial court erred in refusing to give certain instructions.

4. Whether the trial court erred in denying petitioner's motion for a new trial after the jury had acquitted him on the conspiracy charge.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of two counts of violating 18 U.S.C. 1006 and 2 by making and causing false entries and statements to be made upon the records of a savings and loan association insured by the Federal Savings and Loan Insurance Corporation.[1] He was sentenced to three years' imprisonment on one count and two years' imprisonment on the second, the sentences to run concurrently, and fined $10,000 (Pet. 7). The court of appeals affirmed, one judge dissenting (Pet. App. A1-A9).

The evidence showed that one of petitioner's co-defendants,[2] C. Paul Roberts, a land developer and general contractor, had exceeded the loan limit for one borrower at Mutual Savings and Loan Association of

[1]Petitioner was acquitted of defrauding the savings and loan association and of conspiracy (Pet. 7).

[2]Petitioner was one of six defendants charged in a 17 count indictment. This Court denied certiorari in a case involving one of the other defendants named in the indictment. *Dozier* v. *United States*, No. 77-522, certiorari denied, February 21, 1978.

Durham, North Carolina (the Association).[3] Roberts desired additional funds to finance the development of certain property on which he planned to build apartments. In order to obtain loans that would have been unavailable to him if he approached the Association directly, Roberts arranged for Thomas C. Upchurch, an officer of the Home Savings and Loan Association,[4] and C. Thomas Biggs to obtain loans from the Association, in their own names, to finance the construction of several of the units (Ext. Tr. 18-19, 130-131).

Three of the Upchurch loan files at the Association included contractors' affidavits—signed by Thomas C. Upchurch both as the owner and as the contractor—stating that there were no unpaid bills. Upchurch testified that he had signed the affidavits as contractor on instructions from petitioner, although at no time during the construction of the apartment units was he actually the contractor. Petitioner told Upchurch that this was the procedure followed by the Association, and that the affidavits were needed for the Association's files (Ext. Tr. 40-42, 100-101).

Similarly in the two Biggs loan files there were contractors' affidavits—signed by C. Thomas Biggs as both owner and contractor (Ext. Tr. 133). Yet at no time

[3]A Federal Home Loan Bank Board regulation prohibits an insured association from lending any one borrower funds exceeding the lesser amount of either ten percent of the association's withdrawable savings or the full amount of its loss reserves and surplus (Tr. 370-371). As of June 26, 1973 the limit at the Association was approximately $1,070,000 (Tr. 371-372). As of the same date, Association loans to C. Paul Roberts and his interests amounted to approximately $1,825,000 (Tr. 373).

[4]Roberts was also ineligible to borrow any substantial amounts of money from Home Savings and Loan (Ext. Tr. 17-18). "Ext. Tr." refers to the separately paginated portion of the trial transcript captioned "Extracted testimony * * * and Jury Charge."

during the construction of these apartment units was Biggs the contractor (Ext. Tr. 135). When Biggs signed one of the affidavits in the offices of the Association, his name had already been typed in under the space for his signature as the contractor (Ext. Tr. 134-135).

Petitioner, who was the president of the Association, was aware that Roberts (not Upchurch or Biggs) was the contractor for the project.[5]

ARGUMENT

1. a. Resting in large measure on the dissenting opinion below (Pet. App. A4-A9), petitioner contends that the government failed to prove his intent to defraud and that in essence he was convicted merely of violating a banking regulation (Pet. 17-23).

This contention ignores the central fact that petitioner was prosecuted, tried, and convicted for violating Section 1006, which makes it a crime intentionally to make a false entry in the records of a federally insured savings and loan association with the intent to defraud the association or to deceive its officers. He was not convicted of violating a federal banking regulation.[6] The government's evidence showed that petitioner caused affidavits executed by Upchurch and Biggs—which he knew to be untrue—to

[5]Petitioner was thoroughly familiar with Roberts' development, and indeed had arranged for his own family corporation to take out loans from Home Savings and Loan to develop five of the units (Tr. 965-975, 1029).

[6]Indeed the court charged the jury that although there had been testimony "about possible violations by various persons and institutions of said regulations of the Federal Home Loan Bank Board and state regulations" that "a violation of any of these regulations would not be in itself a crime; but a violation may be considered by you on the element of intent" (Ext. Tr. 343-344).

be entered into the Association's files.[7] Those affidavits falsely identified Upchurch and Biggs as contractors and thereby concealed the connection between the loan and the real contractor—who had far exceeded the maximum lending limit at the Association.

There was, moreover, ample evidence from which the jury could have inferred that petitioner acted with the intent to deceive or defraud. A director of the Association testified that he would not have approved a loan to Roberts in excess of the lending limit and that the directors relied upon petitioner (and the other Association officers) to tell them when the limit had been reached (Tr. 359-360). There was also evidence that petitioner concealed from federal examiners Roberts' involvement in the projects for which the Upchurch and Biggs loans were made (Tr. 438-439, 389-390). Finally, there was evidence that, contrary to petitioner's own strict policy, the loan files in question did not contain a copy of the Roberts construction contract (Tr. 394, 974).[8]

b. Petitioner further contends (Pet. 23-25) that the alleged false entries are susceptible to an innocent interpretation, and thus the jury was permitted to convict

[7]Contrary to petitioner's contention (Pet. 27-28) he was properly convicted of aiding and abetting the making of the false entries, since he supervised the loans, and he knowingly caused the entry of the affidavits into the Association's records.

[8]Petitioner's suggestion (Pet. 20) that the court of appeals' decision conflicts with *United States* v. *Gens*, 493 F. 2d 216 (C.A. 1), and *United States* v. *Docherty*, 468 F. 2d 989 (C.A. 2), is without merit. *Gens* is completely inapposite, since it involved a charge of willful misapplication in violation of 18 U.S.C. 656, not making a false entry. In *Docherty*, the court found no false entry on the bank's records where the defendant did not disclose the fact that he intended to give the loan proceeds to another when he recorded and accepted the loans as his own liability. The defendant in *Docherty* made no false statement analogous to the false identification here of the contractor.

on evidence that did not establish his guilt beyond a reasonable doubt. Whether or not an entry is false is a factual issue to be decided by the jury in the light of the relevant circumstances. *United States* v. *Biggerstaff*, 383 F. 2d 675, 679 (C.A. 4). In the instant case, where the contractors' affidavits were signed by persons who were not in fact contractors, there was sufficient evidence to support the jury's findings that the signatures were false entries, which petitioner then caused to be placed in the Association's loan files.

2. Petitioner urges (Pet. 34-36) that the trial court erred in allowing the government to elicit testimony that two of petitioner's co-defendants had pleaded guilty to charges in the same indictment, and in giving no limiting instruction. The relevant facts refute this claim.

Three of petitioner's co-defendants pleaded guilty and testified for the government at petitioner's trial. On direct examination petitioner's counsel asked a defense witness whether he knew the reputations of two of the co-defendants (Upchurch and Biggs) (Tr. 878). The witness responded that "Their reputations were excellent, and I think still are" (Tr. 879). On cross-examination, for impeachment purposes, government counsel asked the witness if he was aware that Upchurch and Biggs pleaded guilty to the indictment (Tr. 880). The trial court overruled petitioner's objection and permitted cross-examination to bring out that aspect of the witness' knowledge (Tr. 879-880). Petitioner contends (Pet. 34-35) that the introduction of this testimony might have permitted the jury to speculate that if Upchurch and Biggs were guilty, then petitioner too must be guilty. The trial court, however, carefully instructed the jury not to draw such an inference (Ext. Tr. 351-352):

> It has, of course, been brought out in the evidence that a defendant named in the indictment entered a plea or has entered a plea to certain of the charges contained in the indictment against him; but the disposition of the case against such defendant who has entered the plea must not be considered by you in determining the guilt or innocence of the defendant in this case except as it might have some bearing on the credibility of a witness.

Evidence of a co-defendant's guilty plea or conviction is not admissible to prove the defendant's guilt, but it is admissible for purposes of impeachment or to attack a witness' credibility, although the trial judge should give a cautionary instruction. *United States* v. *Bryza*, 522 F. 2d 414 (C.A. 7), certiorari denied, 426 U.S. 912. Moreover, even the improper admission of such evidence is not reversible error if it is not unduly emphasized and a cautionary instruction is given. *United States* v. *Newman*, 490 F. 2d 139, 143 (C.A. 3).[9]

3. Petitioner's assertions of errors in the instructions are also without merit.

a. Petitioner contends (Pet. 26-27) that the trial court erred by failing to instruct the jury that the false entry need be material. The complete answer is that the

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[9]Petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123, is misplaced. That case involved not a single reference to the fact that two co-defendants had pled guilty, but rather "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, [were] deliberately spread before the jury in a joint trial." *Id.* at 135-136. *Hudson* v. *North Carolina*, 363 U.S. 697, is also distinguishable, since it involved a co-defendant's midtrial guilty plea before the jury in a joint trial. In those circumstances, the Court found that the potential prejudice to petitioner required professional assistance, and that petitioner's conviction, without benefit of counsel, violated due process.

prohibitions in 18 U.S.C. 1005 and 1006 against false entries in the records of federally insured banks and savings and loan associations apply to any false entries made with the intent to deceive, and materiality is not a requirement. See *United States* v. *Beer*, 518 F. 2d 168, 172-173 (C.A. 5).[10]

b. Petitioner argues (Pet. 36-37) that the trial court erred in refusing several requested instructions concerning good faith. Petitioner ignores the fact, however, that the trial court's instructions regarding willfulness, knowledge, and specific intent to defraud or deceive emphasized the good faith defense. The trial court instructed the jury that in order to convict petitioner they must find that the acts charged were "done voluntarily and purposely and not because of mistake or accident nor of an innocent reason," and "voluntarily and with knowledge that it was prohibited by law and with the purpose of violating the law and not by mistake, accident or in good faith" (Ext. Tr. 332). The court also charged the jury that they must find petitioner had specific intent to defraud (Ext. Tr. 335-337, 341). Since the central elements of petitioner's tendered instruction were contained in the instructions actually given, that was no error. *United States* v. *Pugh*, 509 F. 2d 766 (C.A. 8); *United States* v. *Nance*, 502 F. 2d 615, 619 (C.A. 8), certiorari denied, 420 U.S. 926.[11]

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[10]Petitioner relies (Pet. 26) on *Freidus* v. *United States*, 223 F. 2d 598 (C.A.D.C.), and *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8), but these cases involved 18 U.S.C. 1001. Unlike Sections 1005 and 1006, which apply to the maker of any statement intended to deceive, Section 1001 has been construed more narrowly. See *United States* v. *Beer*, *supra*, 518 F. 2d at 172-173.

[11]Petitioner specifically complains (Pet. 36-37) that the trial court refused to instruct the jury that evidence of innocent transactions conducted in the same manner could be considered as relevant to his intent. In fact, the trial court instructed the jury that "[e]vidence of similar transactions * * * may be considered by you in determining the intent of the defendant * * *" (Ext. Tr. 344).

4. Finally, there is no merit to petitioner's contention (Pet. 29-34) that he was entitled to a new trial on the substantive charges against him after the jury acquitted him of the conspiracy charge. Petitioner urges that the jury's verdict could have been improperly influenced by consideration of evidence admitted in connection with the conspiracy count. But as petitioner recognizes (Pet. 31), the trial court instructed the jury that they could consider this evidence only if they found that a conspiracy existed and that petitioner was one of its members (Ext. Tr. 330). The jury acquitted petitioner on two counts—including the conspiracy count—and there is no reason to believe that they disregarded their instructions.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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